No.

In the Supreme Court of the United States

OCTOBER TERM, 1977

77-142

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD LAVERN CULBERT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
WILLIAM G. OTIS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

Cases:

In the Supreme Court of the United States

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD LAVERN CULBERT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 548 F.2d 1355.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on February 23, 1977. A timely petition for rehearing with suggestion for rehearing

en banc was denied on May 27, 1977 (App. C, *infra*). On June 20, 1977, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether conduct within the plain language of the Hobbs Act (18 U.S.C. 1951) is nonetheless not proscribed by that Act unless it is also proven to constitute "racketeering."

STATUTE INVOLVED

The Hobbs Act, 18 U.S.C. 1951, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

* * * * *

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, respondent was convicted under an indictment (App. D, *infra*) charging attempted bank robbery, in violation of 18 U.S.C. 2113(a), and attempted obstruction of commerce by extortion and threats of violence, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to four years' imprisonment. The court of appeals reversed, one judge concurring in part and dissenting in part (App. A, *infra*).

1. The evidence at trial showed that in March of 1975, respondent and an accomplice, Ted Houser, devised a plan to extort $100,000 from the Bank of Marin in San Rafael, California, by means of threats to the bank president (Tr. 48-51). When the FBI learned of the plan through an informant (Tr. 51-52), agents warned the bank's president, William Murray, and furnished him with a package of false currency and a device to record any telephone threats (Tr. 20-23, 30-34).

Shortly before noon on April 11, 1975, respondent and Houser were observed, first in a car parked in the vicinity of the bank (Tr. 149-150, 192-193), then following Murray's car when he drove to a lunch appointment (Tr. 153-154). While Murray was at the luncheon meeting, agents saw respondent and Houser leave their car and stand at the front of Murray's car (Tr. 156-157, 198-199). When Murray returned to the bank, they followed (Tr. 91-92, 129-130). At about 4:00 p.m. Houser telephoned Murray (who recorded the conversation) and told him that remote-controlled bombs had been placed both at the bank and at Murray's home. Houser instructed Murray to remove $100,000 from the bank vault, take it to his car, and then follow the instructions he would find attached to the front bumper. Houser threatened that if his instructions were not followed the bombs would be detonated, "killing your wife and many others. If you manage to foil this plan, the People's Liberation Army will declare war on your family, your wife and your children will be assassinated one by one" (Gov't Ex. 1; Tr. 34-35).

Murray put the false currency in a briefcase and went to his car, where he found a note that instructed him to drive to a parking lot in San Anselmo, drop the money behind a Goodwill box, and return to the bank (Tr. 35-36; Gov't Exs. 2 and 3). Respondent's fingerprint was on this note (Tr. 238-245).

Murray followed the instructions and left the briefcase in the parking lot (Tr. 38-39, 220-223, 205-207). Moments before Murray arrived at the parking lot,

government agents saw the automobile that respondent and Houser had used earlier drive slowly by; one of its occupants was wearing clothes like those respondent had been seen wearing earlier (Tr. 222-223). A few minutes after Murray left the briefcase, it was found by two young boys, who opened it and tore open the packages of false currency (Tr. 206-208).

2. On appeal, the government confessed error on the bank robbery count,[1] and a divided panel reversed respondent's conviction on the charge of attempted extortion. The majority opinion did not question the fact that the evidence showed attempted extortion of bank assets, and thus fell within the language of Section 1951, but it nevertheless concluded, relying on the analysis of legislative intent in *United States* v. *Yokley*, 542 F. 2d 300 (C.A. 6), that an act "must constitute 'racketeering' to be within the perimeters of the [Hobbs] Act" (App. A, *infra*, p. 3a). The court asserted that a contrary interpretation would usurp virtually the entire criminal jurisdiction of the States.

Judge Carter dissented from the reversal of respondent's conviction for violation of the Hobbs Act on the ground that the "plain and unambiguous language" of the statute prohibits any attempted extortion that has the requisite effect on commerce, and

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[1] The government agreed that 18 U.S.C. 2113(a) does not apply unless the taking of the bank's money is "from the person or presence of another," and that respondent's plan did not contemplate any trespass into the bank or a taking of the money from the person or presence of the bank manager. But see n. 5, *infra*.

neither the language nor the legislative history of the Act limits its coverage to "racketeering." He found it particularly inappropriate to refuse to apply the Hobbs Act in this case, which involved an attempted extortion from a federally insured bank, implicating an industry essential to interstate commerce and one for which Congress has shown special concern (App. A, *infra*, pp. 4a-10a).

REASONS FOR GRANTING THE WRIT

The court of appeals' holding in this case adds a new and undefined element to the offense of extortion affecting interstate commerce. This decision, if permitted to stand, will create great uncertainty as to the scope of the Hobbs Act, a major federal criminal statute, and will substantially impair federal prosecutions for extortions affecting interstate commerce. Moreover, the court's conclusion that only conduct constituting "racketeering" falls within the Act disregards the broad language of the statute, is not supported by the legislative history, and conflicts with decisions in other circuits. The issue presented here is important to the proper administration of the federal criminal laws, and it warrants review by this Court.

1. The Hobbs Act is not expressly limited to "racketeering" activities. It is instead written in comprehensive terms: "Whoever in any way or degree obstructs, delays, or affects commerce * * * by robbery or extortion * * * shall be fined not more than $10,000 or imprisoned not more than twenty years, or

both." 18 U.S.C. 1951(a). As this Court has noted, the Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215.[2] Punishment of respondent's attempt to extort $100,000 from a federally insured bank fits comfortably within the ambit of Congress' power and responsibility to protect the channels of interstate commerce, and this is so quite apart from whether petitioner is a "racketeer," whatever that term may mean.

2. Although the primary purpose of the Hobbs Act was to proscribe violence accompanying unlawful labor related activities,[3] the Act was not limited to this end. The Act's sponsor, whose views are entitled to substantial weight (*United States* v. *Mine Workers*, 330 U.S. 258, 279-280), stated (89 Cong. Rec. 3217 (1943)):

> This bill is grounded on the bedrock principle that crime is crime, no matter who commits it; and that robbery is robbery and extortion extortion * * *. It covers whoever in any way or degree interferes with interstate or foreign commerce by robbery or extortion.

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[2] *United States* v. *Enmons*, 410 U.S. 396, 408, which holds that the Act does not reach the use of force to achieve "legitimate collective-bargaining demands," made no finding that "racketeering" is an element of a Hobbs Act offense.

[3] See *United States* v. *Enmons*, *supra*, 410 U.S. at 401-410, for a review of that aspect of the statute's legislative history and its judicial interpretation by this Court.

This conception of the broad purpose of the Act was echoed by many of its proponents in Congress. See 89 Cong. Rec. 3206-3212 (1943) (remarks of Congressmen Fellows, Springer, and Jennings); 91 Cong. Rec. 11842-11844, 11904-11911 (1945) (remarks of Congressmen Robsion, Michener, Hancock, Gwynne, and Vursell); see also *United States* v. *Golay*, C.A. 8, No. 76-1166, decided June 24, 1977, slip op. 4. In contrast, when Congress intended to make "racketeering" an essential element of an offense, it did so explicitly (see 18 U.S.C. 1961 *et seq.*). It did not do so in the Hobbs Act.

3. Moreover, with the single exception of *United States* v. *Yokley*, 542 F. 2d 300 (C.A. 6), the decision below stands alone among the many appellate decisions in the more than 30 years since enactment of the Hobbs Act in requiring allegation and proof of "racketeering" as an element of the offense. The result in this case is entirely inconsistent with this accumulated jurisprudence (see, *e.g.*, *United States* v. *Pearson*, 508 F. 2d 595 (C.A. 5); *United States* v. *Price*, 507 F. 2d 1349 (C.A. 4); *United States* v. *Augello*, 451 F. 2d 1167 (C.A. 2)) and is in direct conflict with at least two court of appeals' decisions that explicitly considered and rejected the argument successfully advanced by respondent below. *United States* v. *Golay*, *supra*; *United States* v. *Caci*, 401 F. 2d 664 (C.A. 2).

Indeed, the Ninth Circuit itself had previously taken the view that "extortion in *any* area is included [within the coverage of the Hobbs Act] so

long as the necessary effect upon commerce results," *Carbo* v. *United States*, 314 F. 2d 718, 732, certiorari denied, 377 U.S. 953 (emphasis added), and it had quite recently affirmed a Hobbs Act conviction for extortion from a bank in circumstances almost identical to those present here. *United States* v. *Greiser*, 502 F. 2d 1295; see also *United States* v. *Snell*, 550 F. 2d 515, 518-519 n. 7 (C.A. 9).

4. The court of appeals' decision in this case, taken with *Yokley*, thus constitutes a radical departure from prior interpretations of the Hobbs Act, and the uncertainties thereby created are so substantial that they threaten to undermine future use of the Act, at least in the Sixth and Ninth Circuits.[4]

a. The most glaring question left open by these cases is the meaning of the term "racketeering activity." Section 1951 contains no definition of racketeering activity, and the court of appeals supplied none. A related law, the Anti-Racketeering Statute, 18 U.S.C. 1961 *et seq.*, contains a detailed definition of the term: in that statute "racketeering activity" means any act or threat involving certain enumerated crimes, *including extortion*, and any act that is indictable under a number of federal statutes, including Section 1951. The court of appeals evidently did not intend to incorporate that definition, however, since respondent's conduct constituted "racketeering"

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[4] The decision in this case has already led to the dismissal of at least one significant extortion prosecution within the Ninth Circuit. See *United States* v. *Curran*, N. D. Cal., No. 77-186 RHS, decided May 18, 1977.

as defined in Section 1961, yet his conviction was reversed.

The court's failure to define "racketeering" not only jeopardizes future enforcement of the Hobbs Act, but it may well render the statute unconstitutionally vague. "Racketeering" is not a word with a commonly accepted meaning. See, *e.g.*, *United States* v. *Fabrizio*, 385 U.S. 263, 267, where, in rejecting the claim that a statute prohibiting the interstate transportation of gambling paraphernalia (18 U.S.C. 1953), which used the word "whoever," was restricted to persons connected with organized crime or participating in an illegal gambling or lottery enterprise, the Court observed that a "statute limited without a clear definition of the covered group * * * might raise serious constitutional problems."

b. The court of appeals' opinion also leaves open the question whether there is an unintended gap in the protections accorded to federally insured banks. As the facts of this case demonstrate, the federal bank robbery statute, 18 U.S.C. 2113, is not a comprehensive scheme for prosecuting *all* wrongful takings of bank assets. An attempted taking of assets by means of threats or violence apparently comes within that statute only if the attempt is to take "from the person or presence of another." [5] As Judge Carter explained (App. A, *infra*, p. 10a):

[5] While we so conceded and the court so held in this case, at least one court of appeals apparently has reached a contrary conclusion. See *Brinkley* v. *United States*, C.A. 8, No. 76-1418, decided June 24, 1977.

> A successful extortionist, if not subject to prosecution under the Hobbs Act, could only be convicted of bank larceny under 18 U.S.C. § 2113 (b), with the threats of violence going unpunished. * * * And one who unsuccessfully attempts extortion against bank property, as here, could not be prosecuted at all under any federal statute. I cannot believe Congress intended to have this glaring hole in our criminal law.

c. Finally, neither this case nor *Yokley* determines whether "racketeering" is an element of each of the classes of cases included in Section 1951. *Yokley* dealt with the robbery aspect of the statute, and this case with extortion by threats of violence. Section 1951 also includes, for example, extortion "under color of official right." At least one indictment charging ten policemen with conspiracy to extort money by use of their official positions has already been dismissed for failure to allege facts constituting "racketeering." *United States* v. *Curran*, N.D. Cal., No. 77-186-RHS, decided May 18, 1977.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
WILLIAM G. OTIS,
Attorneys.

JULY 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1860

UNITED STATES OF AMERICA, APPELLEE

v.

DONALD LAVERN CULBERT, APPELLANT

Feb. 23, 1977

Before ELY, CARTER and GOODWIN, Circuit Judges.

OPINION

PER CURIAM:

Culbert was convicted, in a jury trial, of two offenses charged in an indictment consisting of two Counts. Count One charged an attempted bank robbery in violation of 18 U.S.C. § 2113(a) (Supp. 1976). Count Two charged an attempt to obstruct, delay, and affect commerce by robbery, extortion, and threats of physical violence, in violation of 18 U.S.C. § 1951 (1970) (hereinafter the "Hobbs Act" or "Act"). We reverse.

Section 2113(a), germane to the first Count, specifies, as one of the elements of the pertinent offense, a taking or attempted taking "from the person or presence of another." The prosecution's evidence was to the effect that Culbert and an accomplice attempted to extort $100,000 from a bank by means of

telephoned threats of physical violence. The instructions given to the bank's president were that he should drop the money at a specified site and then return to the bank. Thus, the criminal plan did not contemplate a trespassory taking "from the person or presence of" the bank president or any other person. Absent proof of that essential element of the offense charged in Count One, the judgment of conviction of the offense alleged in that Count must necessarily be vacated. *See United States* v. *Howard*, 506 F.2d 1131, 1133 (2d Cir. 1974); *United States* v. *Marx*, 485 F.2d 1179, 1182 (10th Cir. 1973), *cert. den.*, 416 U.S. 986, 94 S.Ct. 2391, 40 L.Ed.2d 764 (1974) (stating that § 2113(a) is not directed toward the crimes of extortion and obtaining of money by false pretenses). It should be noted that Government counsel, both in their written brief and in oral argument, conceded, with commendable candor, that Culbert's conviction on Count One should be vacated for the reason above set forth.

For entirely different reasons, the conviction based upon Count Two of the indictment cannot stand. The Hobbs Act, in its present form, is a codification of a 1946 enactment which amended the so-called "Federal Anti-Racketeering Act of 1934." The legality of Culbert's conviction under the Hobbs Act depends upon whether the fact alleged and proved fall within the scope of the Act, which, in pertinent part, provides:

> "(a) *Whoever in any way or degree* obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
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> * * * *
>
> (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. . . ." (Emphasis supplied.)

The Sixth Circuit recently examined, with the utmost care, the legitimate scope of the Hobbs Act. *United States* v. *Yokley*, 542 F.2d 300 (6th Cir. 1976). The court there concluded that, "although an activity may be within the literal language of the Hobbs Act, it must constitute 'racketeering' to be within the perimeters of the Act." *Id.* at 304. A review of the Act's legislative history reveals, without question, that this was the Congressional intent; thus, we adopt the reasoning of the Sixth Circuit's eminently sensible opinion. Given the applicable *de minimis* burden on interstate commerce rule (*See United States* v. *Shackelford*, 494 F.2d 67, 75 (9th Cir.), *cert. denied*, 417 U.S. 934, 94 S.Ct. 2647, 41 L.Ed.2d 237 (1974) a contrary interpretation of the Act would justify federal usurpation of virtually the entire criminal jurisdiction of the states. Considerations of federalism, apart from the legislative history

also emphasized in *Yokley*, cannot permit a conclusion that Congress intended to work such an extraordinary and unprecedented encroachment into the realm of state sovereignty.

Here, the facts do not suggest that the attempted extortion of the bank assets related, in any way, to "racketeering." Consequently, the offensive activity fell within the exclusive criminal jurisdiction of the state of California.

The judgments of conviction are

REVERSED.

JAMES M. CARTER, Circuit Judge, concurring and dissenting:

I concur in the reversal of Count 1 (Robbery), but dissent from the reversal of Count 2 (Extortion).

The plain and unambiguous language of the Hobbs Act (18 U.S.C. § 1951) prohibits any robbery or extortion or attempt to rob or extort which has the requisite effect on commerce. In *Stirone* v. *United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), the Supreme Court noted:

> "The [Hobbs] Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence. The Act outlaws such interference 'in any way or degree.'" *Id.* at 215, 80 S.Ct. at 272.

I must disagree with the majority, therefore, in their conclusion that the Hobbs Act is limited to "racketeering."

Even the legislative history of the Act does not so limit its coverage. Representative Hobbs described the purpose of his bill this way:

> "This bill is grounded on the bedrock principle that crime is crime, no matter who commits it; and that robbery is robbery and extortion extortion. . . . It covers whoever in any way or degree interferes with interstate or foreign commerce by robbery or extortion." 89 Cong. Rec. 3217.

See also United States v. *Green*, 350 U.S. 415, 419, 76 S.Ct. 522, 100 L.Ed. 494 (1956) (amended Act designed to avoid narrow judicial construction of prior Act).

This court has previously recognized the broad reach of the Hobbs Act. In *Carbo* v. *United States*, 377 U.S. 953, 84 S.Ct. 1625, 12 L.Ed.2d 498 (1964), the court stated:

> "Undeniably the act [sic] was particularly aimed at labor racketeering, but by its terms is not so limited. Racketeering in other areas is clearly included. The language of the statute provides fair warning and adequate notice that extortion in any area is included so long as the necessary effect upon commerce results." 314 F.2d at 732.

This court also has previously affirmed, without discussion of the reach of the Act, the conviction of a person under the Hobbs Act for an attempted extor-

tion from a bank almost identical to the one in this case. *See United States* v. *Greiser*, 502 F.2d 1295 (9 Cir. 1974). I believe we should follow these precedents.

The majority states that upholding the extortion conviction on Count 2 "would justify federal usurpation of virtually the entire criminal jurisdiction of the states" and would constitute "an extraordinary and unprecedented encroachment into the realm of state sovereignty."

The majority ignores the extent to which Congress has relied on interstate and foreign commerce to provide a jurisdictional basis for criminal statutes. *See*, *e.g.*, the Dyer Act (18 U.S.C. § 2312); the Mann Act (18 U.S.C. §§ 2421-24); transportation of firearms by an ex-convict, fugitive, or drug user or addict (18 U.S.C. § 922(g)(1), (2), and (3)). Congress has enacted a long list of statutes based on the Commerce clause.[1] The majority's comment of "usurpa-

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[1] 18 U.S.C. § 32. Destruction of aircraft or aircraft facilities;
18 U.S.C. § 33. Destruction of motor vehicles or motor vehicle facilities;
18 U.S.C. §§ 42 and 43. Importation of mammals, birds and fish;
18 U.S.C. § 224. Bribery in sporting events;
18 U.S.C. § 231. Civil disorders;
18 U.S.C. § 542. Entry of goods into commerce by false statements;
18 U.S.C. § 545. Smuggling or importing goods into the United States;
18 U.S.C. § 546. Smuggling goods into foreign countries;
18 U.S.C. § 659. Thefts from interstate or foreign commerce;

tion" and "unprecedented encroachment" is an exaggeration, to say the least, in view of these many statutes.[2]

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18 U.S.C. § 660. Offense by officer or director of corporations engaged in commerce;
18 U.S.C. § 832. Transportation of explosives, etc. in commerce;
18 U.S.C. § 833. Marking packages containing explosives;
18 U.S.C. §§ 834, 836, and 837. Violation of regulations of I.C.C.;
18 U.S.C. § 875. Transportation of demand for ransom or reward;
18 U.S.C. §§ 921 and 922. Firearms;
18 U.S.C. §§ 1073 and 1074. Travel in commerce to avoid prosecution or giving testimony;
18 U.S.C. § 1084. Wagering information transmitted in commerce;
18 U.S.C. §§ 1201 and 1202. Kidnapping, ransom;
18 U.S.C. § 1231. Transportation of strikebreakers;
18 U.S.C. § 1301. Importing or transporting lottery tickets;
18 U.S.C. § 1407. Narcotic addict or violator—border crossing;
18 U.S.C. §§ 1461-65. Obscenity;
18 U.S.C. § 1761. Transportation or importation of prison goods;
18 U.S.C. § 1821. Transportation of dentures;
18 U.S.C. §§ 1951 and 1952. Hobbs Act (the statute here involved);
18 U.S.C. § 1953. Transportation of wagering paraphernalia;
18 U.S.C. § 1992. Train wrecking;
18 U.S.C. § 2101. Riots;
18 U.S.C. § 2117. Breaking or entering carrier facilities;
18 U.S.C. §§ 2311-17. Transportation of stolen property;
18 U.S.C. § 2510, *et seq.* Wire interception.

[2] Many of the statutes have a companion section on lack of preemptive intent by Congress. 18 U.S.C. § 233 is a good example.

[Footnote continued on page 8a]

A second basis for jurisdiction, interference with a federal function or officer, underlies an equally large number of federal statutes. Examples are bankruptcy offenses (18 U.S.C. §§ 151-55); postal offenses (18 U.S.C. §§ 1691-734); and offenses involving federally insured banks and building and loan associations (18 U.S.C. § 2113). Together, crimes involving interstate and foreign commerce or interference with a federal function or officer encompass most federal crimes.[3]

The true question in this case is whether a federally insured national bank is involved in interstate commerce so as to fall within the jurisdictional parameters of this federal criminal statute. It is obvious that the banking industry vitally affects interstate commerce. Furthermore, a federally insured national bank specifically comes within the statutory definition of commerce because the United States has exclusive jurisdiction over banks and banking by

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[2] [Continued]

"Nothing contained in this chapter shall be construed as indicating an intent on the part of Congress to occupy the field in which any provisions of the chapter operate to the exclusion of State or local laws on the same subject matter, nor shall any provision of this chapter be construed to invalidate any provision of State law unless such provision is inconsistent with any of the purposes of this chapter or any provision thereof."

Thus, Congress preserved state jurisdiction in the area while extending federal jurisdiction.

[3] Additional bases for federal jurisdiction of crimes are (1) the tax power (*e.g.*, income tax offenses, tax on transfers of machine guns, etc.); and (2) maritime and territorial jurisdiction (18 U.S.C. §§ 7 and 13; 18 U.S.C. §§ 113-14).

virtue of Title 12 of the United States Code. Congress has evidenced its concern over crimes against banks by passing a specific bank robbery statute, 18 U.S.C. § 2113.

The section begins: "§ 2113 *Bank robbery and incidental crimes.*" Various crimes are listed in addition to robbery, *e.g.*, attempts, entry to commit a robbery, stealing money or property of the bank, receiving or dealing with the money or property stolen or carried away from the bank, and assaults in committing either robbery (subsection (a)) or theft (subsection (b)).

However, the Congress, in enacting 18 U.S.C. § 2113, did not deal specifically with extortion. *See United States* v. *Marx*, 485 F.2d 1179 (10 Cir.), *cert. denied*, 416 U.S. 986, 94 S.Ct. 2391, 40 L.Ed.2d 764 (1973).

We need not today decide whether every extortion occurring in interstate or foreign commerce should be included within the scope of the Hobbs Act. In our case, a federally insured bank is involved. It is the kind of a federal institution customarily protected by federal statutes from interference. It is also engaged in interstate commerce. Hence, it warrants protection against attempted extortion more than an ordinary commercial institution. It is no great extension of federal jurisdiction to hold that the extortion conviction on Count 2 is valid.

Our court is not bound by *United States* v. *Yokley*, 542 F.2d 300 (6 Cir. 1976), relied upon by the majority. Moreover, the case is distinguishable. It in-

volved an actual robbery of a "K-Mart" department store. Federal jurisdiction has not been extended (except as possibly extended by the Hobbs Act) to protection of department stores. Protection of a federally insured national bank is quite a different thing.

The majority's position results in an anomaly in the coverage by our criminal statutes. A successful extortionist, if not subject to prosecution under the Hobbs Act, could only be convicted of bank larceny under 18 U.S.C. § 2113(b), with the threats of violence going unpunished. Such a person would be subject to the 10-year maximum penalty under 18 U.S.C. § 2113(b), rather than the 20-year penalty under 18 U.S.C. § 2113(a) when force is used. And one who unsuccessfully attempts extortion against bank property, as here, could not be prosecuted at all under any federal statute. I cannot believe Congress intended to have this glaring hole in our criminal law.

I would affirm the conviction on Count 2, but agree with the majority on Count 1 and would reverse that conviction.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1860

DC# CR 75-421 LHB

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DONALD LAVERN CULBERT, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said District Court in this Cause be, and hereby is reversed.

Filed and entered February 23, 1977.

APPENDIX C

UNITED STATES COURH OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1860

[Filed May 27, 1977, Emil E. Melfi, Jr.,
Clerk, U.S. Court of Appeals]

UNITED STATES OF AMERICA, APPELLEE

v.

DONALD LAVERN CULBERT, APPELLANT

ORDER

Before: ELY, CARTER, and GOODWIN, Circuit Judges.

The majority of the panel in the subject case (Ely and Goodwin) has voted to deny the Petition for Rehearing. Judge Carter, the third member of the panel, would grant panel rehearing. Judges Ely and Goodwin vote to reject the suggestion for en banc rehearing, and Judge Carter recommends that such suggestion be rejected.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en-banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX D

JAMES L. BROWNING, JR.
United States Attorney
Attorney for Plaintiff

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Criminal No. CR-75-421 LHB

[Filed Jun. 5, '75, William A. Whittaker, 746 AM,
Clerk, U.S. District Court, No. Dist. of Ca.]

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONALD LAVERNE CULBERT AND
THEODORE RAMON HOUSER, DEFENDANTS

VIOLATIONS: Title 18 U.S.C. Section 2113(a)-Bank Robbery; Title 18 U.S.C. Section 1951(a) Interference with Commerce by Threats of Physical Violence

INDICTMENT

COUNT ONE: (Title 18 U.S.C. § 2113(a))

The Grand Jury charges: THAT

On or about April 11, 1975, in the County of Marin, State and Northern District of California,

DONALD LAVERNE CULBERT and
THEODORE RAMON HOUSER,

defendants herein, did by the intimidation of a threatened bomb detonation, attempt to take from the person of William P. Murray, President, Bank of

Marin, San Rafael, California money in excess of $100 belonging to and in the care, custody, control and possession of the aforesaid bank whose deposits were then and there insured by the Federal Deposit Insurance Corporation.

COUNT TWO: (Title 18 U.S.C. § 1951(a))

The Grand Jury further charges: THAT

On or about April 11, 1975, in the County of Marin, State and Northern District of California,

DONALD LAVERNE CULBERT
and THEODORE RAMON HOUSER,

defendants herein, did attempt to obstruct, delay and affect the commerce and the movement of a commodity in commerce, to wit: $100,000.00 in United States currency belonging to and in the care, custody, control and possession of the Bank of Marin, San Rafael, California, by robbery and extortion and threatened physical violence to persons and property by detonation of a bomb in the home of William P. Murray and in the Bank of Marin in furtherance of their planned robbery and extortion.

A True Bill.
/s/ [Illegible]
Foreman

/s/ James L. Browning, Jr.
JAMES L. BROWNING, JR.
United States Attorney

APV'D as to form JL
AUSA:LOCKIE

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